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No. 95-8736

In the Supreme Court of the United States

OCTOBER TERM, 1996

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUGGESTION OF MOOTNESS

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Pursuant to Rule 21 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, suggests that the Court dismiss this case as moot.

The question presented in this case is whether 18 U.S.C. 3583(d) authorizes a district court to order a criminal defendant deported, as a condition of supervised release, without recourse to the standards and procedures for determining deportability and relief from deportation under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and implementing regulations. That question is based on petitioner's challenge to a condition of supervised release imposed by the district court at his original sentencing. The court of appeals affirmed that condition in a judgment entered on May 5, 1995. Petitioner's

petition for rehearing was denied on January 22, 1996. Since the denial of rehearing, however, on April 10, 1996, the district court has entered an order revoking petitioner's supervised release and ordering his imprisonment, without imposing any new term of supervised release. See U.S. Br. 6-7. Petitioner's sentence in this case thus no longer includes a term of supervised release. Nor does his sentence include the deportation condition formerly imposed on that revoked term of supervised release. The revocation of petitioner's supervised release by the district court thus renders the case moot.

1. This Court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). As the Court has recognized, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam).

Petitioner's challenge to the condition of his supervised release that he be deported cannot "affect the rights of litigants in the case before" this Court, 404 U.S. at 246, because the challenged order of deportation was imposed as a condition on a supervised release term that has been revoked. None of the conditions of that revoked term of supervised release are in force at this time, including the condition that petitioner be deported. Petitioner has thus obtained the key relief that he seeks in this case—vacation of the condition of his supervised release term that required his deportation and precluded him from appealing or resisting any order of deportation by the

Immigration and Naturalization Service. Petitioner did not appeal from the order revoking his supervised release, and, accordingly, that term cannot be reinstated.

In our brief on the merits, we noted that it was unclear whether the district court had contemplated that petitioner would be deported under the original sentence upon completion of the term of imprisonment imposed on revocation. We also noted that the Eleventh Circuit had not, apparently, determined whether an order of judicial deportation, under its interpretation of Section 3583(d), may be carried out after the revocation of supervised release and the completion of the term of reimprisonment, when no new term of supervised release was imposed. U.S. Br. 6. We now believe that neither the district court nor the court of appeals could give any operative effect to the deportation condition that was part of the revoked term of supervised release in this case.

The Eleventh Circuit has expressly stated that a revoked term of supervised release "no longer exists." *United States* v. *Tatum*, 998 F.2d 893, 895 (1993). Thus, when the sentencing court in this case revoked petitioner's supervised release, that term of supervised release, and its conditions, ceased to exist.[1] To our knowledge, no court has suggested

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[1] In *Tatum*, the court held that, under former law, the sentencing court was without statutory authority to reimpose a new term of supervised release to follow imprisonment ordered upon revocation of supervised release. We do not agree with the holding of *Tatum* on that issue; in our view, a court operating under former law did have the power to reimpose a new term of supervised release to follow a term of imprisonment ordered upon revocation of supervised release. We agree with *Tatum*, however, that upon revocation, the

that a revoked term of supervised release automatically carries forward to be served later. Rather, if a supervised-release violator is required to serve a term of imprisonment as a result of his violation, any further supervised release must be expressly ordered by the sentencing court at the time of revocation. That did not occur here.

Absent any continuing existence of the condition that petitioner challenges, no live controversy remains, and the case is nonjusticiable under Article III of the Constitution. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). An actual controversy must exist at all stages of appellate review, including in this Court. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Because a live controversy no longer exists in this case, the case has become moot.[2]

2. This Court has recognized that an exception to usual mootness principles may be applied in cases that are capable of repetition, yet evading review.

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original term of supervised release "no longer exists." Since *Tatum*, Congress has clarified, in 18 U.S.C. 3583(h), that, when a court revokes supervised release, it may order a defendant to be placed on a new term of supervised release to begin after the completion of imprisonment. The sentencing court in this case did not invoke Section 3583(h) when it revoked petitioner's supervised release and ordered him imprisoned.

[2] Indeed, because petitioner's supervised release was revoked on April 10, 1996, the case became moot before the petition for a writ of certiorari was filed in this Court on April 19, 1996. This Office did not become aware of the revocation of petitioner's supervised release until after the Court granted certiorari on October 1, 1996.

The Court has also reviewed challenges involving criminal sentences even after completion of the sentence if the challenged provision has collateral legal consequences. Neither basis for finding an exception to the mootness doctrine exists in this case.

a. In the brief filed by the amicus curiae invited by this Court to defend the judgment of the court of appeals, amicus suggests that, because a similar deportation condition is included as a term of supervised release to which petitioner has been sentenced in another criminal case in another federal district court, this case falls within the mootness exception for controversies that are capable of repetition, yet evading review. See Br. of Court-invited Amicus Curiae 5 n.4. To come within that exception, two showings are necessary: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Neither condition is met in this case.

On March 18, 1996, petitioner was charged in the United States District Court for the Northern District of Alabama with commission of bank fraud. Petitioner ultimately was indicted on that and other federal charges, entered a guilty plea to the indictment, and was sentenced by that court to 24 months' imprisonment, to be followed by five years' supervised release. U.S. Br. 7 n.5. The court ordered, *inter alia*, as a condition of supervised release, that petitioner be deported immediately upon completion of his term of imprisonment, in accordance with Section 3583(d), and that petitioner be delivered to an authorized INS official for execution of the deportation order. *Ibid.*

The Alabama district court order does not demonstrate that petitioner, "the complaining party" in this case, is likely to be subject again to the same action that he challenges here. *Weinstein* v. *Bradford*, 423 U.S. at 149. The legal issues raised by the Alabama judgment are not identical to the legal issues raised in this case. By the time of the sentencing by the Alabama district court, an immigration judge had entered an order of deportation against petitioner under the INA, 8 U.S.C. 1101 *et seq.*, and had issued a warrant directing the INS to arrest and deport petitioner. See U.S. Br. 6 n.4. Petitioner did not appeal the immigration judge's order and was thus under a final order of deportation under the INA, see *Stone* v. *INS*, 115 S. Ct. 1537 (1995); an immigration judge had also denied his motion to reopen his deportation proceedings. See U.S. Br. 6 n.4. When an alien defendant is under a final deportation order pursuant to the INA and an immigration judge has ordered him to be arrested and deported, the Attorney General already has made her final determination, under the standards and procedures of the INA, that the alien is subject to deportation under the INA. See *id.* at 30 (indicating that an alien subject to deportation for purposes of Section 3583(d) is "an alien who *has been* or will be ordered deported by the Attorney General under the INA") (emphasis added). An order of judicial deportation under Section 3583(d) entered *after* a final administrative order of deportation raises different legal issues from those raised by the instant case. Cf. *Murphy* v. *Hunt*, 455 U.S. 478, 481 n.5 (1982) (per curiam) (defendant's challenge to limitation on pretrial bail was moot after his conviction; even if the defendant had challenged limitations on bail pending

appeal, that claim involved different legal considerations).

Nor does a challenge to the validity of a judicial deportation order involve a condition that is "too short" in duration to permit complete review in the federal judicial system before its expiration. *Weinstein* v. *Bradford*, 423 U.S. at 149. Petitioner is entitled to appeal a sentence, and he could have appealed the sentence imposed by the Alabama district court, including the judicial order of deportation imposed as a condition of supervised release.[3] If a defendant (such as petitioner) anticipates that he will complete his term of imprisonment and then face deportation under a term of supervised release before completion of the entire appellate process (including any review by this Court), the defendant may seek to protect his ability to obtain relief by requesting a stay of the judicial deportation order. Any failure on a defendant's part to take advantage of the available means to protect an appeal of his sentence would not justify application of the mootness exception for controversies that evade judicial review, because any loss of direct appeal rights could be avoided.[4] Indeed, at least one petition raising the legal issue presented here did reach this Court without becoming moot.

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[3] To our knowledge, petitioner had not filed a notice of appeal from his sentence in the Alabama district court within the time allowed by Fed. R. App. P. 4(b). The finality of that sentence thus makes it doubtful that any favorable resolution of the underlying legal issue in this case would help petitioner in that case.

[4] Petitioner, of course, is under an independent final order of deportation issued under the INA. Petitioner did not seek review of that order or invoke procedures that would operate to stay it. See 8 U.S.C. 1105a(a)(3) (1994).

See *Chukwura* v. *United States*, cert. denied, 115 S. Ct. 102 (1994) (No. 93-8962); see 93-8962 U.S. Br. 5-6, 8 (petitioner had sought stay of court of appeals' mandate pending his petition for certiorari, and his petition for judicial review of his administrative order of deportation under the INA was pending in the court of appeals, thus automatically staying deportation under 8 U.S.C. 1105a(a)(3) (1994)).

It would not be appropriate to apply the capable-of-repetition-yet-evading-review exception here based on speculation that the Alabama district court's deportation order could become moot in the same manner as in the instant case. That would require petitioner to violate his supervised release conditions—an occurrence that petitioner can avoid, and is compelled by law to avoid. Exemption of a controversy from mootness because it will otherwise continue to evade review is generally justified only when the evasion of review results from circumstances that cannot be avoided. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 317-323 (1988) (aging); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (progression of pregnancy); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (public elections); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-603 (1982) (completion of criminal trials from which press and public are excluded).

Finally, application of the mootness exception for recurring controversies that evade review would be particularly inappropriate in this case, because the prospect of "repetition" of the specific legal controversy raised by petitioner will be eliminated after April 1, 1997, the effective date of Section 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 138

Cong. Rec. H11,798 (daily ed. Sept. 28, 1996)) (to be codified at 8 U.S.C. 1230(a)(3)). Section 304(a)(3) adds to the INA a new Section 240 that states that,

> [u]nless otherwise specified in [the INA], a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.

The INA does "otherwise specif[y]" that judicial orders of deportation are authorized in proceedings under the recently enacted, and even more recently amended and renumbered, Section 238(c) of the INA (to be codified at 8 U.S.C. 1228(c)) (see U.S. Br. 33-38). That Section, unlike 18 U.S.C. 3583(d), includes detailed procedures requiring, *inter alia*, a recommendation from the INS regarding the alien's eligibility for relief from deportation. The INA, however, does not "otherwise specif[y]" that the determination of the admission or removal of an alien is authorized in proceedings under Section 3583(d) of Title 18.

Thus, the new provision of IIRAIRA overrides the holding of the court of appeals in this case.[5] It follows that the legal issue presented in this case, *i.e.*, the authority of the sentencing court under Section 3583(d) to enter a judicial order of deportation, will not recur in the same form after April 1987. See Br. of Court-invited Amicus Curiae 23 n.9 (suggesting that, in light of IIRAIRA, controversy presented by instant case may lack any continuing importance, and

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[5] The Court granted certiorari in the instant case on October 1, 1996. IIRAIRA had just been enacted the preceding day and had not been discussed in the parties' briefs at the petition stage, which were filed before that enactment.

dismissal of the writ of certiorari as improvidently granted may be warranted). That circumstance deprives the particular controversy here of prospective likelihood of repetition.[6]

It is, of course, true that judgments entered before IIRAIRA's effective date may present the same legal issue raised by petitioner. Other petitions presenting that issue are in fact pending before this Court. The Court-invited amicus curiae suggests that the Court might be able to avoid the consequences of mootness in this case by granting review in one or more of those cases. Br. of Court-invited Amicus Curiae 6 n.4.[7] The United States is currently preparing responses to the petitions in those cases. The diminishing importance of the controversy in light of IIRAIRA, however, weighs against the Court granting review in those cases simply to preserve the legal issue for review despite the mootness of this case.

b. Challenges to criminal convictions are not moot even after defendants have completed service of their sentences if the conviction carries collateral legal consequences. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) (civil and employment disabilities imposed by

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[6] Petitioner will remain in prison, under the Alabama district court's sentence, beyond the April 1, 1997, effective date of Section 304(a)(3) of the IIRAIRA.

[7] See *Oboh* v. *United States*, petition for cert. pending, No. 96-6653; *Bowen* v. *United States*, petition for cert. pending, No. 96-6658. In addition to those two cases, petitions raising the issue have been filed in two more cases. See *Akamiokhor* v. *United States*, petition for cert. pending, No. 96-6898; *Valdez-Mejia* v. *United States*, petition for cert. pending, No. 96-7063. In at least some of those cases, however, the petitioner has already been deported. Those cases thus may be moot as well.

law); *Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (a criminal case is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction"); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) (possibility of impeachment and future criminal enhancement); *Minnesota* v. *Dickerson*, 508 U.S. 366, 371 n.2 (1993) (future determination of criminal history).

Challenges to criminal convictions or sentencing orders are, however, rendered moot by completion of the sentence if the particular conviction or order does not carry such collateral consequences. See *Lane* v. *Williams*, 455 U.S. 624 (1982) (dismissing as moot a challenge to a revocation of parole when, before the case could be decided by the Court, the defendants had been released); see also *Broughton* v. *North Carolina*, 717 F.2d 147 (4th Cir. 1983) (challenge to misdemeanor contempt conviction became moot upon expiration of sentence because conviction had no effect on defendants' civil rights and did not present a possibility of enhancement of sentence in future criminal proceeding, and because defendant's continued reputational interests were not sufficient to avoid mootness), cert. denied, 466 U.S. 940 (1984); *Vandenberg* v. *Rodgers*, 801 F.2d 377, 378 (10th Cir. 1986) (per curiam) (challenge to delay in release on parole rendered moot by release on parole because no collateral consequences remained from delay; possibility that defendant may be subjected to future adverse consequences because of underlying incident report was too speculative).

The revoked condition of supervised release that petitioner be deported does not have any continuing collateral legal consequences for petitioner. No civil liabilities result from a revoked deportation condition

of supervised release. Nor does a revoked deportation condition of supervised release have consequences for impeachment, future criminal sentence enhancement, or employment prospects. Petitioner does not challenge the conviction underlying his sentence (or the findings of supervised release violations underlying the revocation order), which might have such consequences. Rather, he challenges only a condition of supervised release that was never executed and that no longer exists. Cf. *North Carolina* v. *Rice*, 404 U.S. 244, 246-248 (1971) ("Nullification of a conviction may have important benefits for a defendant * * * but urging in a habeas corpus proceeding the correction of a sentence already served is another matter.").[8]

Nor does the district court's determination to impose a deportation condition, in the now-revoked term of supervised release, have any collateral legal consequences. The district court's determination, standing alone, would not affect any future criminal or immigration proceeding against petitioner. Petitioner was convicted of violating 8 U.S.C. 1326 (1994), which requires proof that he is an alien who re-entered the United States illegally following a prior

[8] Contrary to the suggestion of an amicus curiae, the order of the district court revoking petitioner's supervised release does not appear to have been based in any respect on petitioner's violation of the deportation condition of supervised release. See Br. of Amicus Curiae WLF 10 n.3. As we explained in our brief, the order itself does not recite the grounds for revocation, but the probation officer's petition for revocation, which serves to notify the defendant of the grounds on which revocation is being sought, cited four grounds, none of which was the fact that petitioner had not been deported. See U.S. Br. 6.

deportation. Moreover, the INS has, since the imposition of the criminal sentence in this case, independently found him to be deportable and ordered his deportation under the provisions of the INA.[9] In the face of those determinations establishing petitioner's status as a deportable alien, there is no basis for any speculation that the unexecuted condition of supervised release requiring deportation of petitioner would have any collateral effect on him in any future proceeding.

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In sum, any decision by this Court that invalidated the now-revoked deportation order that was imposed as a condition of supervised release would have no

[9] The immigration judge's order that petitioner be deported under the INA is not based on the supervised-release deportation condition. Rather, the INS order to show cause why petitioner should not be deported was based on a charge under Section 241(a)(1)(A) of the INA, 8 U.S.C. 1251(a)(1)(A) (1994), that, at the time of his entry, he was excludable because he had been previously arrested and deported and had not obtained consent of the Attorney General to reenter as requir ed under Section 212(a)(6)(B)(i) of the INA, 8 U.S.C. 1182(a)(6)(B)(i) (1994). The May 12, 1995, decision and order of the immigration judge cited that order to show cause, found that the INS had established alienage and deportability, and ruled that petitioner had waived any relief from deportation. Similarly, the June 5, 1995, warrant of deportation cites Section 241(a)(1)(A) as the basis for petitioner's deportation. Finally, the February 1, 1996, order of the immigration judge denying petitioner's motion to reopen proceedings simply rejected petitioner's claims of insufficient notice and asylum.

effect on the judgment in this case. Because the condition of supervised release that petitioner challenges has been revoked, the case is now moot and should be dismissed.

Respectfully submitted.

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Acting Solicitor General

DECEMBER 1996